UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1164

FGS Constructors, Inc., Appellant, v. Michael Carlow, doing business as Carlow Enterprises; Carole Oberlitner; Carl Oberlitner; United States of America; Bureau of Indian Affairs, Appellees.	*	Appeal from the United States District Court for the District of South Dakota.

Submitted: June 14, 1995

Filed: September 5, 1995

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and LOKEN, Circuit Judge

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BRIGHT, Senior Circuit Judge.

I. INTRODUCTION

FGS Constructors, Inc. (FGS) appeals the district court's granting of summary judgment in favor of the United States. In addition, FGS appeals the district court's granting of Michael Carlow's, Carole Oberlitner's and Carl Oberlitner's motions to dismiss, and denying FGS's motions to amend its complaint and to extend discovery. For the reasons that follow, we affirm in part and reverse in part.

II. BACKGROUND

This case arises from a renovation project of the White Clay Dam located on the Pine Ridge Indian Reservation. In 1989, the United States, through the Bureau of Indian Affairs (BIA), agreed to provide funding to the Oglala Sioux Tribe (Tribe) for repairs to the White Clay Dam, pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA). The Tribe contracted with Cooper Consultants, Inc. (CCI) to be the project engineer, and Michael Carlow d/b/a Carlow Enterprises (Carlow) to be the general contractors. These contracts were approved by the government. Carl and Carole Oberlitner provided Carlow with a surety bond pursuant to the Miller Act, 40 U.S.C. § 270a-d, guaranteeing Carlow's performance on the contract.

Carlow then hired FGS as a subcontractor to perform mechanical and structural work on the dam. FGS's responsibility was to perform the key repair and reconstruction work on the dam gates and spillway. FGS claims that problems arose during the performance of their contract. Generally, FGS asserts that the BIA and CCI failed

to perform their obligation of draining the dam which prevented FGS from performing its subcontract work on time and materially raised FGS's costs. FGS subsequently suspended work and requested payment for the work already performed. FGS claims that they have not been paid in full for the work that they have already performed.

FGS then brought a diversity action in federal district court against Carlow for breach of contract, against Carl and Carole Oberlitner for enforcement of Miller Act bonds, and against the government for negligence based on its violation of federal statutes and regulations and for the imputed negligence of CCI under the Federal Tort Claims Act (FTCA).

The district court issued two separate orders relevant to this appeal. First, the district court dismissed the contract action against Carlow and the Oberlitners on the grounds of comity and failure to exhaust tribal court remedies. Second, the district court granted summary judgment in favor of the United States, determining that the contract between CCI and the Tribe was not a self-determination contract and that CCI was not an "Indian contractor" within the meaning of the ISDEAA. Therefore, the district court determined that the United States was not liable for CCI's alleged negligent performance.

Additionally, FGS filed a motion to amend the complaint one and a half years after the original complaint was filed. The district court denied FGS's motion to amend on the grounds that it would increase the scope and complexity of the issues involved, require the parties to essentially start discovery from the beginning, severely prejudice the government and unduly delay the case.

This appeal followed.

III. DISCUSSION

A. Claims Against Carlow and the Oberlitners

The district court granted Carlow's and the Oberlitners' motions to dismiss. In granting the motions, the district court determined that due to comity concerns, FGS must first exhaust any tribal court remedies it had against Carlow and the Oberlitners. The district court concluded that, because this case arose out of a construction contract on the Pine Ridge Indian Reservation, with Indian and non-Indian parties, respect for the sovereignty retained by the Tribe dictates that the tribal courts be given the opportunity in the first instance to address FGS's claims. In addition, the district court ruled that Carlow and the Oberlitners waived the Miller Act venue requirement,[1] requiring suits in the federal court to be brought in the district in which the contract was to be performed and executed, by the language of the dispute resolution clause in the contract.

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[1] Section 270b of the Miller Act provides:

> Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

40 U.S.C. § 270b(b) (1988).

FGS concedes that the district court correctly concluded that federal venue could be waived by a valid forum selection clause or a dispute resolution clause in a contract. FGS argues, however, that no waiver occurred in the contract, or subcontract, in this case.

The contract between Carlow and FGS contained the following dispute resolution clause: "In the event there is any dispute between the parties arising out of this agreement, it shall be determined in the Oglala Sioux Tribal Court or other court of competent jurisdiction." App. at 193. FGS argues that the phrase "or other court of competent jurisdiction" expanded the venue options to include the federal district court in addition to the tribal court. FGS contends that pursuant to *In re Fireman's Fund Ins. Co.*, 588 F.2d 93 (5th Cir. 1979), this contract clause should be enforced unless the appellees show that enforcement would be unreasonable under the circumstances.

We do not agree with the district court's determination that FGS must first exhaust its remedies in the tribal court. The contracting parties agreed that a plaintiff could sue either in the federal district court of South Dakota (a court of competent jurisdiction) or in the tribal court. By this forum selection clause, the Tribe agreed that disputes need not be litigated in tribal court. The district court, therefore, had no significant comity reason to defer this Miller Act litigation first to the tribal court. Indeed, while we agree with the district court that a federal court does not have exclusive jurisdiction over these Miller Act claims, it nevertheless is the usual forum for such claims and has a significant interest in determining the merits of the action.

The district court determined that the venue provision of the Miller Act, Section 270b(b), was a venue provision enacted for the benefit of defendants, like Carlow and the Oberlitners. The district court stated that "[f]ederal courts following the holding in *F.D. Rich Co.* [417 U.S. 116 (1974)] have held the statute to constitute a waiveable venue requirement and have recognized that the provision was enacted for the benefit of defendants in Miller Act actions. *See In re Fireman's Fund Ins. Co.*, 588 F.2d 93, 94-95 (5th Cir. 1979) (holding that the Miller Act venue requirement, enacted for the benefit of defendants, can be waived by a valid forum selection clause in a contract); . . . " Dist. Ct. Opinion dated March 4, 1993, at 6. The district court concluded that because Carlow and the Oberlitners moved to dismiss the federal claims against them, they had, in effect, waived any right to litigate the Miller Act case in federal court.

We disagree with this analysis. While the Miller Act venue requirement, requiring suits to be brought in the district where the contract was to be performed, served to benefit defendants and could be waived by defendants, these rules and requirements have no relevance to this issue. No provision in the agreement gave these defendants the right to override a plaintiff's choice of forum under the forum selection clause. Since Carlow and the Oberlitners agreed to be sued in the federal district court of South Dakota, those defendants are not privileged to force the dispute into the tribal court. Accordingly, we reverse the district court's order granting Carlow's and the Oberlitners' motions to dismiss.

B. Claims Against the United States

We review the granting of summary judgment de novo, applying the same standard as the district court. *Dillaha v. Yamaha Motor Co.*, 23 F.3d 1376, 1377 (8th Cir. 1994). Summary judgment is appropriate if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

The district court granted summary judgment in favor of the government and against FGS, concluding that the United States was not liable for the alleged negligent performance of the self-determination contract by CCI. The district court determined that in order for FGS to impute CCI's negligence to the government pursuant to this act, FGS has to prove two elements: 1) that the contract between the Tribe and CCI was a self-determination contract under the ISDEAA; and 2) that CCI was an Indian contractor. The district court ruled that FGS failed to prove both of these elements.

FGS contends that under the ISDEAA, specifically Pub. L. No. 101.512, Title III, § 314, 104 Stat. 1959 (codified at 25 U.S.C. § 450f notes (Supp. IV 1992)), the government is liable for the alleged negligence of CCI because any claim against a tribe is deemed to be a claim against the United States. FGS argues that the district court erred, and the United States is liable for CCI's negligent performance of the self-determination contract because the contract was not simply "attached," but by express modification was included and became a component of the self-determination contract. FGS claims that

the United States was statutorily liable for CCI's negligent performance of the self-determination contract because CCI was an Indian contractor as described in the Indian Self-Determination and Education Assistance Act. We disagree.

ISDEAA, § 314 provides in part:

> [w]ith respect to claims resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act . . . an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior- . . . while carrying out any such contract or agreement and its employees are deemed employees of the Bureau . . . while acting within the scope of there [sic] employment in carrying out the contract agreement: *Provided,* That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any **tribe, tribal organization, Indian contractor or tribal employee** covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act. . . .

(Emphasis added) Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1959 (codified at 25 U.S.C. § 450f notes).

The ISDEAA promotes the long-standing federal policy of encouraging Indian self-determination, giving Indian tribes control over the administration of federal programs benefiting Indians. Under a self-determination contract, the federal government supplies funding to a

tribal organization, allowing the tribal organization to plan, conduct and administer a program or service that the federal government otherwise would have provided directly. 25 U.S.C. § 450f, b(j).

In 1988, Congress amended the ISDEAA to allow recovery under the Federal Tort Claims Act for certain claims arising out of the performance of self-determination contracts. Congress acknowledged that the tribal governments, when carrying out self-determination contracts, were performing a federal function and that a unique legal trust relationship existed between the tribal government and the federal government in these agreements. Because of this relationship, Congress concluded that the federal government must provide liability insurance to the tribal government for self-determination contracts.

We agree with the district court's determination that CCI is not an Indian contractor under § 314. The ISDEAA limits the application of FTCA coverage to tort "claims resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act of 1975." Pub. L. No. 101-512, § 314, 104 Stat. 1959. The Act specifies that "a contract . . . entered into [part A of the ISDEAA] between a tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services . . . otherwise provided to Indian tribes and their members pursuant to Federal law" is a self-determination contract. 25 U.S.C. § 450b(j). Thus, by definition, the ISDEAA does not contemplate that a private party such as CCI can enter into a self-determination contract. As the

district court explained, the purpose and policy of the ISDEAA are best served if the term "Indian contractor" is limited to a tribe-related organization that may itself enter into a self-determination contract, not a private party such as CCI that has been retained to work on a project funded by a self-determination contract. Thus, CCI is not an "Indian contractor" within the meaning of § 314.

FGS also argues that the district court erred by denying its motion for leave to amend its complaint and by denying its request to reopen discovery. FGS sought to amend its complaint to include a contract action against the United States, reurge original district court jurisdiction over the contract claims against Carlow and the Oberlitners, and add CCI and the Tribe as named defendants in contract and negligence claims under the Miller Act, the FTCA, and the ISDEAA.

Whether to grant leave to amend pleadings lies within the sound discretion of the district court. *Fuller v. Secretary of Defense*, 30 F.3d 86, 88 (8th Cir.), *cert. denied*, 115 S. Ct. 583 (1994). Here, the district court's denial of FGS's motions to amend its complaint and to reopen discovery was well within its discretion. FGS's motions were filed approximately one and a half years after the original complaint was filed. Although the district court extended discovery several times, FGS's motions were filed almost two months after the discovery cut-off date and several weeks after the court's cut-off date for filing such motions. Therefore, we determine that the district court did not abuse its discretion in denying FGS's requests to amend its complaint and to extend discovery.

IV. CONCLUSION

Accordingly, we reverse the district court's granting of Carlow's and the Oberlitners' motions to dismiss. In addition, we affirm the district court's granting of summary judgment in favor of the United States and its denial of FGS's motions to amend its complaint and to extend discovery.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1164SDRC

FGS Constructors, Inc., Apellant, v. Michael Carlow, doing business as Carlow Enterprises; Carole Oberlitner; Carl Oberlitner; United States of America; Bureau of Indian Affairs, Appellees.	*	Appeal from the United States District Court for the District of South Dakota

JUDGMENT

(Filed Nov. 1, 1995)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part and reversed in part in accordance with the opinion of this Court.

September 5, 1995

A true copy.

ATTEST:

/s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FGS CONSTRUCTORS, INC., Plaintiff, vs. UNITED STATES OF AMERICA, and the BUREAU OF INDIAN AFFAIRS, Defendants.	)	CIV. 92-5137 JUDGMENT (Filed Nov. 21, 1994)

The government filed a motion for summary judgment on September 6, 1994 (Docket #83). Plaintiff FGS filed a counter-motion for summary judgment on September 15, 1994 (Docket #95). Based upon the memorandum opinion filed on this date, it is hereby

ORDERED that the government shall have judgment against FGS.

IT IS FURTHER ORDERED that costs in the amount of $1888.15 shall hereinafter be taxed and inserted by the Clerk.

Dated this 21st day of November, 1994.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
CHIEF JUDGE

ATTEST:
WILLIAM F. CLAYTON, CLERK
by: Alice R. Raesly
Deputy Clerk
(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FGS CONSTRUCTORS, INC., Plaintiff, vs. UNITED STATES OF AMERICA, and the BUREAU OF INDIAN AFFAIRS, Defendants.	)	CIV. 92-5137 MEMORANDUM OPINION (Filed Nov. 21, 1994)

On September 6, 1994, the United States and the Bureau of Indian Affairs ("government") moved for summary judgment. Plaintiff FGS Constructors, Inc. ("FGS") filed a counter-motion for summary judgment on September 15, 1994.

PROCEDURAL HISTORY AND FACTS

This case arose out of an attempt to repair the White Clay Dam on the Pine Ridge Indian Reservation. The Oglala Sioux Tribe ("OST") entered into a contract with the government for the funding of the engineering and repair work to be done on the dam. The contract was executed pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA"). Contracts executed pursuant ISDEAA are referred to as self-determination contracts. A contract authorized by ISDEAA is a self-determination contract. *Comes Flying v. United States*, 830 F. Supp. 529, 530 (D.S.D. 1993).

OST contracted with Cooper Consultants, Inc. ("Cooper") to perform the engineering work on the project. A written engineering contract to that effect was executed with Cooper. This contract was then sent to the contracting officer with the Bureau of Indian Affairs ("BIA"). The engineering contract was attached to the self-determination contract between OST and the BIA.

OST also hired Michael Carlow d/b/a Carlow Enterprises ("Carlow") as the general contractor for the project. Carlow in turn hired FGS as a subcontractor to do the mechanical and structural work on the dam. FGS originally brought suit against Carlow for breach of contract, against Carl and Carole Oberlitner for enforcement of Miller Act bonds, and against the government for negligence based on its violation of federal statutes and regulations and for the imputed negligence of Cooper under the Federal Torts Claims Act ("FTCA").

After the Court decided the government's motion to dismiss in this case, only one of FGS's claims remained. That claim was for the "negligence of the government's project engineer, imputed to the government through Public Law Number 101-512, § 314." *FGS Constructors, Inc. v. Carlow*, 823 F. Supp. 1508, 1511 (D.S.D. 1993). Specifically, FGS alleged "that the engineer acted negligently in failing to draw down the dam and in erroneously depicting the conditions of the dam below the surface of the reservoir." *Id.* at 1514.

In its response to the government's motion for summary judgment and in its counter-motion for summary judgment, FGS attempts to allege another cause of action which was not set forth in its complaint. It appears that

FGS now contends that the government itself was negligent in performing the self-determination contract because it caused an unreasonable delay in lowering the dam reservoir, in issuing change orders, and in approving progress payments.[1] The Court specifically set forth the claims which were pleaded by FGS in *FGS Constructors, Inc. v. Carlow,* 823 F. Supp. at 1511. The claim FGS attempts to present now was not one of them. The Court denied FGS's motion to amend its complaint. FGS cannot now circumvent that ruling by alleging this new claim in the summary judgment pleadings. Consequently, these new claims are not considered.

SUMMARY JUDGMENT STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if it can be shown "that there is no genuine issue as to any material fact and that [the moving party] is entitled to judgment as a matter of law." *Poller v. Columbia Broadcasting Sys., Inc.,* 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458, 488 (1962). In determining whether summary judgment is appropriate, the facts and inferences are viewed in the light most favorable to the nonmoving party. The burden is placed on the moving party to establish both that there are no genuine issues of material fact and that

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[1] Even if these claims were properly pleaded, the Court finds that they are actually claims for breach of contract, and thus, this Court would not have jurisdiction. Contract claims with an amount in controversy of $10,000 or more are the exclusive jurisdiction of the claims courts. *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.,* 797 F.2d 668, 675 (8th Cir. 1986).

it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings. The nonmoving party must then set forth specific facts by affidavit or other evidence showing that a genuine issue of material fact exists.

In examining the evidence in summary judgment motions, the Court must apply the appropriate substantive evidentiary burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). In this case, the burden is a preponderance of the evidence. The Supreme Court has noted that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.' "[2] *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986). The nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts," *Matsushita*, 106 S. Ct. at 1356, and "[w]here the record as a

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[2] Plaintiff's statement on page 3 of its response to the defendants' motion for summary judgment that "summary judgment is an extreme and treacherous remedies [sic] is no longer supported by the trilogy of *Celotex*, *Matsushita*, and *Liberty Lobby*. The spirit of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970) (cited by plaintiff) has been overruled by the trilogy. Thus, summary judgment is no longer a remedy disfavored by the courts.

whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' *Id.*

According to Local Rule of Civil Procedure 56.1(C), a party opposing summary judgment must "respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record." FGS did not comply with this rule. Rule 56.1(C), Rule 56.1(D) provides that "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." Thus, all of the statements of undisputed material facts set forth by the government are accepted as true for purposes of the government's motion for summary judgment.

ISDEAA BACKGROUND

FGS contends that under the ISDEAA, specifically Public Law Number 101-512, Title II section 314 (section 314), the government is liable for the alleged negligence of Cooper. Section 314 provides in part as follows:

> With respect to claims resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act . . . an **Indian tribe, tribal organization or Indian contractor** is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior . . . while carrying out any such contract or agreement and its employees are deemed employees of the Bureau . . . while acting within the scope of their

> employment in carrying out the contract or agreement: *Provided,* That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any **tribe, tribal organization, Indian contractor or tribal employee** covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act. . . .

(Emphasis supplied.) Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959 (codified at 25 U.S.C.A. § 450f notes (West Supp. 1993)). The purpose of the ISDEAA is to promote Indian self-government by encouraging Indians to actively and meaningfully participate in beneficial federal programs. 25 U.S.C. § 450a; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 111 S. Ct. 905, 910, 112 L. Ed.2d 1112 (1991). In order to accomplish this goal, under the ISDEAA, a tribal organization can enter into a self-determination contract with government. *See* 25 U.S.C. § 450b(j); 25 U.S.C. § 450f. Through self-determination contracts, tribal organizations receive funds from the government with which to administer and plan programs for and services to Indians. *Id.* Thus, the government's role in planning, conducting, and administering programs and services is minimized.

In 1988, the government determined that some of the funding set aside for federal Indian programs was wrongfully being absorbed by indirect costs associated with self-determination contracts such as the procurement of liability insurance. *See* S. Rep. No. 274, 100th Cong., 2d Sess. 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2628.

The result of this determination was an amendment to the ISDEAA which required the government to obtain liability insurance for Indian tribes, tribal organizations, and tribal contractors performing under self-determination contracts. *See* Pub. L. No. 100-472, § 201(c)(1), 102 Stat. 2285, 2289 (1988). The purpose of this amendment was to guarantee financial stability for programs run under self-determination contracts. *See* 1988 U.S.C.C.A.N. at 2620.

In 1989, in order to comply with Public Law Number 100-472, Congress amended the ISDEAA to provide FTCA coverage to Indian tribes, tribal organizations, and Indian contractors for claims occurring only in 1990 which arose from self-determination contracts. *See* Pub. L. No. 101-121, § 315, 103 Stat. 701, 744 (1989). In 1990, Congress made the FTCA coverage set forth in Public Law Number 101-121 permanent by enacting section 314 which provided coverage for all future claims.

DISCUSSION

In this case, in order for FGS to impute Cooper's negligence to the government, FGS must prove two elements. First, it must prove that the engineering contract was authorized by the ISDEAA. The Court finds it was not so authorized and therefore it was not a self-determination contract under section 314. Second, even assuming that the OST-Cooper contract was a self-determination contract, nonetheless FGS must prove that Cooper was an Indian contractor. This second element would be mooted by the Court's finding that the contract

is was [sic] not a self-determination contract. Nonetheless, the Court will address the second issue.

I

The Engineering contract as a self-determination contract.

In its statement of undisputed material facts the government asserts that the United States and the OST were the only two parties to the self-determination contract. The government also states that "[t]he Oglala Sioux Tribe and Cooper Consultants, Inc. entered into a contract, separate and distinct from the self-determination contract the Oglala Sioux Indian Tribe had with the United States." While the Court might accept these facts as true, consistent with its assurance to counsel at oral argument, it does not rest its determination on plaintiff's failure to properly respond under Local Rule 56.1(D). Notwithstanding the Court's acceptance of the government's material facts as true, the Court has examined the record for summary judgment and concludes that the OST-Cooper contract was not a self-determination contract; therefore, summary judgment in favor of the government is proper.

Under section 314, in order to impute Cooper's negligence to the government, FGS must establish that Cooper was a **tribe, tribal organization, or an Indian contractor.** FGS contends that Cooper is an Indian contractor because Cooper is 100 percent Indian owned and it is a contractor. The government contends that an Indian contractor

means a tribal organization.[3] The ISDEAA does not define the term "Indian contractor." Thus, this Court must interpret the meaning of the term. In interpreting the term, the Court must bear in mind the general principle that waivers of sovereign immunity must be narrowly construed. As the court stated in interpreting section 314,

> A waiver of sovereign immunity by the United States must be strictly construed and may not be extended by implication. Here, it is clear that in the 1990 Act Congress waived sovereign immunity by allowing FTCA liability to attach to injuries arising out of certain contracts (more precisely, self-determination contracts) between U.S. government agencies and tribal organizations.

Comes Flying, 830 F. Supp. at 531. The Court finds the FGS's definition of the term "Indian contractor" is an attempt to paint with too broad a brush. The mere attachment of the Cooper contract to the OST self-determination contract does not also make the Cooper contract a self-determination contract.

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[3] In support of its position, the government cities the case of *A. Y. McDonald Supply Co. v. United States*, Civ. No. 92-3043 (D.S.D. March 29, 1994) (Jones, J.). In that case, the court ruled that although the contractor was Indian owned and thus, a minority contractor, the status of minority contractor does not make one an "Indian contractor" under section 314. The court held that "[i]t's the Court's view that within the context of the statute that the Tribe who is contracting with the federal government is the Indian contractor within the meaning of the statute." A.Y. McDonald was a bench ruling from which there was no appeal. It therefore is of limited authority.

II

Cooper as an Indian contractor.

The term "Indian contractor" as contained in section 314 has not been defined by Congress. The term Indian contractor has been defined within the meaning of the Buy Indian Act. Relying on a statement in a BIA bulletin, the Supreme Court, defined an Indian contractor as "a legal entity that is 100% Indian owned and controlled." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 100 S. Ct. 1905, 1906 n.3, 64 L. Ed.2d 548 (1980) (citing 20 BIAM Bull. 1 (March 3, 1976)). Apparently, Cooper would be considered an Indian contractor under this definition.

Although the ISDEAA does not define the Indian contractor, it does contain provisions which refer to Indian-owned economic enterprises. 25 U.S.C. § 450e(b)(2); 25 U.S.C. § 450f(2). An Indian-owned economic enterprise is defined as "any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: Provided, that such Indian ownership shall constitute not less than 51 per centum of the enterprise." 25 U.S.C. § 1452(e). Essentially, this definition is the same one the Supreme Court used in *Andrus* to define Indian contractor. It would be inappropriate for this Court to determine that the terms Indian contractor and Indian-owned economic enterprise have the same meaning under the ISDEAA. As the Supreme Court stated in *Russello v. United States*, "We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simply mistake in

draftsmanship." *Russello v. United States*, 464 U.S. 16, 104 S. Ct. 296, 300, 78 L. Ed.2d 17 (1983); *see also United States v. Yip*, 930 F.2d 142, 148 (2d Cir. 1991).

Thus, it appears that for purposes of the ISDEAA, the legislature intended to use the term "Indian-owned economic enterprise" when referring to an economic enterprise that is 51 percent Indian owned and controlled. For purposes of the ISDEAA, Cooper would not be an Indian contractor, it would be an Indian-owned economic enterprise. If Congress intended in section 314 to extend FTCA liability to enterprises such as Cooper, it could have easily used the broader term of Indian-owned economic enterprise, defined it in other broader terms, or simply have defined Indian contractor to include contracts such as was entered into between OST and Cooper.

In interpreting statutory language, a court must consider the context of the statute in which the language appears. *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 109 S. Ct. 278, 281, 102 L. Ed.2d 186 (1988). In this case, the context of the statute intended that Indian contractor is a tribal organization which has entered a self-determination contract. Under the ISDEAA, the only parties who could enter into one of these contracts or agreements with the government are Indian tribes, tribal organizations, or Indian contractor. According to 25 U.S.C. § 450h, grant agreements can be entered into with tribal organizations or tribes. According to 25 U.S.C. § 450f, a self-determination contract can only be entered into by tribal organizations. The Court might rationally speculate that the reason the legislature added the term Indian contractor was to differentiate between tribal organizations who

had entered into contracts and tribal organizations who had received grants.

The Court believes the purpose and policy of the ISDEAA supports the definition of Indian contractor as a tribal organization which has entered a self-determination contract. In construing a statute, it is proper to look to "the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 110 S. Ct. 997, 1001, 108 L. Ed.2d 132, (199). The government could be subjected to extensive liability if it were held liable for *any* 51 percent Indian contractor hired by OST If this happened the government would be forced to take a more active role in the selection and supervision of the contractors which the OST hired under the self-determination contracts. This would completely undermine the purpose of the ISDEAA which as stated above is to transfer control of programs and services for Indians from the government to the Indian people. 25 U.S.C. § 450a(b).

CONCLUSION

Based upon this memorandum opinion, the Court concludes that (1) the OST-Cooper contract is not a self-determination contract, and (2) in any event, Cooper is not an Indian contractor under section 314.

Defendant's motion for summary judgment is granted and plaintiff's counter-motion for summary judgment is denied. An order shall issue forthwith. Costs are to be assessed to defendants against plaintiff.

Dated this 21st day of November, 1994.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
CHIEF JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By: /s/ Alice R. Raesly
Deputy Clerk

(SEAL)